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THE LIMITATIONS OF THE ACTION OF ASSUMPSIT AS AFFECTING THE RIGHT OF ACTION OF THE BENEFICIARY.

(Continued from Volume 53, page 127.)

> That you may know
> 'Tis no sinister nor no awkward claim,
> Pick'd from the worm-holes of long vanish'd days,
> Nor from the dust of long oblivion rak'd,
> He sends you this most memorable line,
> In every branch truly demonstrative;
> Willing you overlook this pedigree:
> And, when you find him evenly deriv'd
> From his most fam'd of famous ancestors,
> Edward, the Third, he bids you then resign
> Your Crown and Kingdom, indirectly held
> From him the native and true challenger.
>
> King Henry V, Act. ii, Scene 1.

In previous issues of this periodical the writer has traced the right of action of the beneficiary of a contract from the period of Edward III to the end of the reign of Elizabeth. The cases therein presented plainly show that there were three different forms of action successfully employed by the beneficiary—(1) the Action of Account; (2) the Action of Debt, and later, (3) the Action on the Case. It

has also been shown that in the reign of James I these remedies all existed and were concurrent.

The first part of the present paper will be devoted to a more detailed examination of the judicial reasoning which enlarged the remedy of the beneficiary, (1) by giving him the writ of Debt in addition to the writ of Account, and (2) by further adding to these two remedies the third alternative remedy of an Action on the Case.

In the second part of this paper the writer's purpose is to trace these three cumulative and concurrent remedies from the beginning to the end of the seventeenth century.

By what reasoning was an Accountability in favor of a third party transmuted into a debt?

It has been previously shown[1] that a force was in operation as early as the middle of the fifteenth century impelling the accountee to employ the writ of Debt rather than the writ of Account. One motive was doubtless his desire to avoid the cumbersome procedure of the two trials attendant upon the action of Account—the first trial being before a jury to determine the defendant's liability to account as receiver, and the second trial being before auditors to ascertain and state the account. Another potent motive was to fix upon the defendant an absolute liability; for if the defendant could be shown to be a debtor of the plaintiff the defences available to a receiver were inadmissible.[2] The plaintiff-accountee successfully argued in the sixteenth century[3] that if before action was brought he had demanded an account from the defendant, and the defendant had neglected or refused to furnish it, the plaintiff was entitled

[1] See 52 AM. LAW REGISTER, pp. 771, 772.

[2] The defences are collected in Comyn's Digest. Title, "Accompt."

[3] Sir Robert Brooke, who was chief justice of the common pleas, 1554-1558, thus abridges (Brooke, Dett, 129) a decision rendered in 1573, in Y. B. 36 H. 6, 9. "Debt by Wange & Bittinge, where ten pounds is paid to W. N. to my use I shall have action of Debt or of Account against W. N."

Clark's Case, Godbolt, 219 (1612); Ames' Cases on Trust, 4 in the Common Pleas Records: "Note it was said by Cook, C. J., and agreed by the whole court, and 41 and 43 E. 3, etc. That if a man deliver money unto I. S. to my use, that I may have an action of Debt, or Account against him for the same at my election."

thenceforth to treat the defendant no longer as his receiver[4] but as his debtor. Two centuries later we find Lord Holt still recognizing this practice.[5]

When a beneficiary to whom the defendant was accountable as receiver by reason of the receipt of property delivered to the defendant by the hands of another brought an action of debt the plaintiff was obliged to declare first that the defendant was accountable to him as his receiver for that the defendant had received property from another for the benefit of the plaintiff, and, second that the defendant by refusing to account had become the plaintiff's debtor. The alternative remedies of account and debt became available to the beneficiary-accountee from about the close of the sixteenth century.[3] The right to employ the writ of Debt as a concurrent remedy was not achieved without some apparent straining of legal terms. To aver that a defendant had received property for the benefit (*al oeps; ad opus*)[6] of the plaintiff and that he (the defendant) thereupon became indebted to the plaintiff was a hard saying to Lord

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[4] Professor Langdell says in II H. L. R., 253, "It seems that a demand of payment by the plaintiff and a refusal or failure to pay by the defendant will establish a conversion and thus enable the plaintiff at his option to maintain debt." * * * "An obligation to account may indeed be converted into a debt and when that is done of course debt or *indebitatus assumpsit* will lie."

[5] In *Poulter* v. *Cornwall*, 1 Salk, 9, *Indebitatus assumpsit* was brought for money received *ad computandum*. The verdict was for the plaintiff, and it was moved in arrest of judgment that no debt had been shown and hence that account should have been brought. *Et per cur.*: "The verdict has aided the declaration, for it must be intended there was proof to the jury that the defendant refused to account, or had done somewhat else that rendered him an absolute debtor."

Jenkins' Centuries, published in 1661, in case lxiv of the sixth century, contains the following: "A delivers £40 to B to be delivered to C and D to be divided between them; they bring two several actions of debt for their respective £20; adjudged that this is well, and affirmed in error." Also T. B., fifth century, case ii.

[6] See 53 Am. Law Register, p. 124.

Coke[7] in the seventeenth century just as it has been to Professor Langdell in the nineteenth.[8] For in debt the defendant has the power to appropriate the property to his own exclusive benefit and profit. How then could a defendant be charged as debtor who had received property for the benefit of another? The King's Bench, not without difficulty, decisively held that the original receivership had by the defendant's non-performance on demand been changed into the relationship of indebtedness.[9] The remedy of debt

[7] In *Baugh* v. *Phillips*, 1 Rolle's Reports, p. 157 (1616), debt was brought by the bailor of cattle to recover monies received from their sale by defendant. Coke, C. J., at first said: "He can have an action of debt in this case. * * * One delivers monies to B to the use of C, C can have action of debt or account for it, so here he can have this action when he receives it to his use." But later in the same case we read: "Coke. I doubt whether this action of debt lies in this manner as it is brought for possibly it will permit a barbarism to grow up, viz., to bring action of debt in nature of an account; but Doderidge thought there was enough on the subject."

[8] Professor Langdell declares that this "*Indebitatus* count for money had and received * * * seems to have been framed in entire forgetfulness that any * * * distinction existed" (*i. e.*, between a debt and an obligation to account), "for it alleges a legal impossibility, namely, that the defendant is indebted to the plaintiff for money had and received by the defendant *to the plaintiff's use.*

"If in truth the defendant is indebted to the plaintiff for money had and received by the defendant, it follows that the money was received by the defendant to his own use; and if the money was in truth received by the defendant to the plaintiff's use, it follows that it is the plaintiff's money, and that the defendant is accountable for it. And yet this inconsistency in the language of the count has never attracted attention."—"A Brief Survey of Equity Jurisdiction," by C. C. Langdell, 2 Harvard Law Review, p. 255 (1889).

[9] *Harris* v. *De Bevoice*, 2 Rolle's Rep., p. 440.

S. C. Cro. Jac., 678 (1625). The report in Rolle is as follows: "Squior delivers money to Peter de Bevoice *ad solvend* to Harris, H. brings Debt against B * * * Dodridge, Justice * * * it is a contract which the law makes * * * so I hold the Action of Debt maintainable * * * Sir James Ley, Chief Justice *Concessit*, when the bailment is to give to another or to pay to another in satisfaction of a Debt or to lend to another, the stranger shall have Debt, but I doubt if when it is to deliver to the other only in this *depositum* * * * Doddridge, Justice, the declaration is, *ad solvendum*, and to what purpose the payment was, whether for the benefit of the first bailor or of the second bailee that will be upon the evidence, and not in the declaration, Ley, it will be clear upon the evidence, wherefore Dodridge, if he does not show better matter, take your judgment." The report of Croke, 688, says: "Wherefore rule was given that judgment should be entered for the plaintiff, unless other cause, &c."

for the accountee was however no ideal mechanism. In the early seventeenth century if the evidence showed a greater or less sum to be due than the declaration in debt alleged, the plaintiff could not have judgment.[10] To avoid using this Procrustean machine accountees sought another remedial writ in the beginning of the seventeenth century.

An examination of the cases of the early part of the seventeenth century will show by what device of pleading and practice the much needed action on the case, under the specific name of *Indebitatus Assumpsit* became a recognized remedy of the beneficiary.

Preliminarily, however, a thorough comprehension must be had of that radical reformation in procedure which occurred at the end of the reign of Elizabeth and is fully expressed in the decision in Slade's Case.[11]

It is now a matter of common knowledge that by a procedural innovation, resting upon a fictitious promise the action on the case was extended to the enforcement of simple debts.[12] This innovation, though slightly antedating Slade's case, was practically contemporaneous with that decision. The resolution in Slade's case having firmly established the principle that every simple common law debt necessarily includes a promise to pay that debt and that the action of case or *indebitatus assumpsit* would lie upon that fictitious promise, the beneficiary of an accountability or debt soon employed this reformed procedure with success.

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[10] In *Baugh* v. *Phillips*, 1 Rolle's Rep., 257 (1616), a writ of debt was brought to recover from the defendant the proceeds of the sale of cattle delivered by the plaintiff to the defendant to sell for what they would bring. The declaration was for £24 8*s*.; but as the verdict was for the plaintiff for £24 and *non debet* as to the 8*s*., the judgment was reversed by the king's bench.

"The count in debt must state * * * the names of the persons from whom money was received to the use of the plaintiff with the amounts of each receipt." J. B. Ames in II H. L. R., p. 57.

By employing this then novel remedy of *indebitatus assumpsit*, "it was enough to allege the general nature of the indebtedness, as for * * * money had and received to the plaintiff's use." J. B. Ames in II H. L. R., p. 57.

[11] 4 Coke's Reports, p. 927 (1602).

[12] J. B. Ames in II H. L. R., pp. 16, 17.

As early, at least, as 1617, the King's Bench (Coke, *C. J.*, and Houghton, *J.*) held that where "a man delivers money to my use * * * I can have action on the case for them."[13] Rolle, *C. J.*, both reported the case in the foregoing language, and in his Abridgment thus commented upon it: "If a man delivers money to B to my use I can have action on the case against B for this money, because I can have action of debt against him."[14] The report of the same case by another hand throws additional light on the origin of *indebitatus assumpsit* in favor of a beneficiary. Under the name of *Babington* v. *Lambert* the case is thus reported by Moore:—"In the King's Bench in an action on the case upon *assumpsit,* in consideration that the defendant had received £24 of divers persons to the use of the plaintiff, he promised to pay it to the plaintiff such a day. And found for the plaintiff. And in arrest of judgment it was moved that the declaration was not good because it is not stated of what particular persons he received the money. But the whole court was against him because it is a consideration executed and so not traversable, wherefore the plaintiff had judgment."[15]

In 1651, Rolle, *C. J.*, rendered a similar decision where, in "an action upon the case upon *assumpsit*" to recover £29 the thing bailed was not money, but goods. "The father gave goods to his son, in consideration that the son should pay the plaintiff in this action £20. It was urged that this can be no consideration for the plaintiff to bring his action because here is no debt due to him. * * * Rolle, *C. J.*, held, that it is good as it is, for there is a plain contract because the goods were given for the benefit of the plaintiff, though the contract be not between him and the defendant, and he may well have an action upon the case, for here is a promise

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[13] *Beckingham* v. *Vaughan,* 1 Rolle's Reports, p. 391; the same case is also reported under the style of *Babington* v. *Lambert,* Moore's Reports, p. 854.

[14] Rolle's Abridgment, p. 7 (N), 2.

[15] Moore's Reports, p. 854.

[16] *Starkey* v. *Mill,* Styles, 296 (1651).

in law made to the plaintiff, though there be not a promise in fact, and there is a debt here; and the *assumpsit* is good * * * judgment was given for the plaintiff."[16] Of the several important principles illustrated by this and a preceding and similar decision [17] of the eminent chief justice[18] not the least important is the principle that the beneficiary may employ case in the form of *indebitatus assumpsit* where a debt has been created in his favor. Rolle, *C. J.*, thus relies, on the one hand, upon the substantive law that a beneficiary is entitled to recover where an accountability or debt exists in his favor,[19] and on the other hand this opinion recognizes that since Slade's case the substantive right may be enforced by the writ of *indebitatus assumpsit.* Twenty-five years before Slade's case the beneficiary of an

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[17] *Disborne* v. *Denabie,* Rolle's Ab., p. 30, pl. 5.

[18] Rolle sat in the common pleas as puisne justice and chief justice ten years, 1645-1655. His learning, impartiality and ability called forth the highest tribute from Sir Matthew Hale, who wrote the preface to Rolle's Abridgment, and therein thus eulogizes the author:

"He was a man of very great natural ability, of a ready and clear understanding, strong memory, sound, deliberate and steady judgment, of a fixed attention of mind to all business that came before him, of great freedom from passions and perturbations, of great temperance and moderation, of a strong and healthy constitution of body which rendered him fit for study and business and indefatigable in it. * * * He spent his time under the bar and for some years after in diligent study of the Common Law, neglecting no opportunity to improve his knowledge thereunto, that from his first admission to the Society of the Inner Temple, which was 1 Feb. 6 Jac. and till his call to be a Sergeant, he had contemporaries of the same Society of great parts, learning and eminence; as namely, Sir Edward Littleton, afterwards Chief Justice of the Common Pleas and Lord Keeper of the Great Seal of England; Sir Edward Herbert, afterwards Attorney-General; Sir Thomas Gardyner, afterwards Recorder of London; and that treasury of all kinds of learning, Mr. John Selden; with these he kept a long, constant and familiar converse and acquaintance; and thereby greatly improved both his own learning and theirs, especially in the Common Law, which he principally intended: For it was the constant and almost daily course for many years together of these great traders in learning to bring in their several acquests therein, as it were, into a common stock by mutual communication, whereby each of them became in a great measure the participant and common possessor of the others' learning and knowledge."—Hale's Preface to Rolle's Abridgment, London, 1668.

[19] See 52 AM. LAW REGISTER, pp. 764 to 779.

accountability or debt could not maintain *assumpsit* "because there is no consideration between them."[20]

After Slade's case the test of the beneficiary's right of action in case or *indebitatus assumpsit* is his right to maintain account or debt. As in *Starkey* v. *Milne*[21] the defendant had received goods other than money from the bailor, similarly in 1655 in Thomas's case[22] the property transferred was realty. The defendant had promised a father that if he would surrender a copyhold to the defendant the latter would pay "unto his two daughters £20 a piece." Glynne, *C. J.*, accordingly gave judgment for one of the daughters for £20. The plaintiff's action was here Case.

The *ratio decidendi* of the foregoing cases holding that where the beneficiary could recover in debt he could elect the writ of case or *indebitatus assumpsit* is clear. The resolution in Slade's case having positively settled the practice that case or *indebitatus assumpsit* would lie wherever debt would lie,[23] the accountee or beneficiary by making an unsuccessful demand for an account became entitled to employ the action of case or *indebitatus assumpsit.* The action of *special assumpsit* based upon a detriment incurred by the plaintiff is therefore not to be confounded with Case or *Indebitatus assumpsit* based upon a pre-existing debt.

The employment of the writ of *indebitatus assumpsit* in the seventeenth century, as a remedy where money had been delivered to the defendant for the plaintiff's use has already been very distinctly pointed out by Professor Ames. But the further right to employ the same writ when chattels or lands have been transferred to the defendant "for the plaintiff's use" is equally clear, though at the present day this right is not fully realized. The result has been that all the rights and privileges enjoyed by the beneficiary in account and debt in the sixteenth and seventeenth centuries,

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[20] *Howlet* v. *Hallet* (37 Eliz.) 1 Danvers Abr. 57. pl. 51. In Anonymous, Keilwey, 77a, 77b, pl. 25 (1506), Frowike, J., said: "The stranger has not any other remedy except action of account."

[21] Styles, 296 (1651).

[22] Styles, 461 (1655).

though rightfully cast by descent upon the beneficiary in *indebitatus assumpsit,* have not been claimed by him or have been claimed unsuccessfully. But this disherison of the beneficiary seems wholly unjustifiable. Wherever in the sixteenth and seventeenth centuries the action of debt would lie in favor of the beneficiary, the result must follow that after the resolution in Slade's case there is a concurrent remedy of *indebitatus assumpsit.* The rule of practice is reiterated with surely sufficient frequency in the seventeenth and eighteenth centuries that wherever debt will lie *indebitatus assumpsit* will also lie.[23]

The disherison of the beneficiary from his historic right has in the course of two hundred years, occurred by a procedural blunder readily comprehensible. The result to be anticipated from the practice inaugurated by Slade's case was a confusion between the different kinds of contractual liability where all kinds were enforceable by the same action —the action on the case. That action had been employed since the reign of Henry VII to enforce the special promise based upon a detrimental element called a "consideration."

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[23] *Janson* v. *Colomore,* 1 Rolle, 396 (1617). Here action on the case was brought "and counts that whereas the defendant was indebted to him on an account he was found in arrears so much * * * and Doderidge said that Slade's case is that every debt executory includes an *assumpsit.* * * * And judgment was given for the plaintiff."

Professor Ames, in his "Essay on Assumpsit," II H. L. R., 54, remarks: "*Indebitatus assumpsit* became concurrent with debt upon a simple contract in all cases."

The Exchequer said in 29 Car. II, "Wherever the plaintiff may have an account, an *indebitatus* will lie." *Arris* v. *Stukely,* 2 Mod. Case, 148. This should be understood, however, as meaning that an account had been demanded and refused or neglected to be given under circumstances sufficient to establish a Conversion.

In Hard's Case, 1 Salk. 23 (1702), it is said: "*Indebitatus assumpsit* will lie in no case but where debt lies."

The gambling cases at the close of the seventeenth century well illustrate the use of *indebitatus assumpsit* as a substitute for debt, but not as a substitute for *special assumpsit.* Neither debt nor its derivative *indebitatus* would lie against the loser of a bet. Hard's Case, 1 Salk. 23 (1702); *Bovey* v. *Castleman,* 1 Lord Ray. 69 (1702); *Smith* v. *Aiery,* 6 Modern Case, 174 (1705), where the court said: "An *indebitatus assumpsit* did not lie for money won at play; for that action never would lie but where *debt* would lie." But as debt would lie against the holder of the stakes, *indebitatus assumpsit* would also lie against him. *Rowley* v. *Dad,* Freeman, p. 263 (1679).

The technical and specific name of *special assumpsit* was not always given to that action. Quite frequently the term "action on the case upon an *assumpsit*" was employed. It has already been shown that the action on the case was used after Slade's case to enforce a simple common law debt. The technical name of *indebitatus assumpsit* was not always given to that action. Reporters have generally striven towards abbreviation rather than precise terminology. Finally, the action of *indebitatus assumpsit,* as pointed out by Professor Ames, has been employed by Lord Mansfield, and since his day to enforce a species of obligations not arising from consent; to which obligations the term *"quasi contracts"* has been applied by common usage.[24] The wonder therefore, is not that there ultimately occurred a confounding of the substantive rights expressed by the terms accountability and debt, with the rights expressed by the concept *"special assumpsit"* or by the concept *"indebitatus assumpsit* upon a *quasi contract,"* but that two centuries were required to effect the adumbration of the first conception by the two last. Finally, the careless use of the term "consideration" from about the close of the seventeenth century to express both the *Quid pro Quo* of Debt and the consideration in special *assumpsit*—an ambiguity noted by Professor Langdell—has in conjunction with the foregoing causes operated to produce in the nineteenth century a partial eclipse of the law of simple contracts, so that to-day we see but darkly.

When Chief Justice Rolle, harassed, so it is said, by Cromwell's interference with the administration of justice, resigned from the head of the court in 1655, he had served long enough to see the entire law of simple contracts administered under the new procedure—the action on the case. He had himself, as has been heretofore shown, carefully preserved and enforced under this new procedure, the substantive rights of the beneficiary formerly enforceable only by the writ of debt or of account. He had, with true

[24] Ames' "Essay on Assumpsit," II H. L. R., 54, 63.

appreciation of the vital distinction between law and procedure differentiated the action on the case when brought to enforce a debt from that other form of the action on the case which for many years before his day had been used to enforce a special promise or *assumpsit* based upon a consideration. Henceforth, we shall see that Rolle's successors recognized and enforced the right of the beneficiary to an accounting or to a debt arising from a failure to account in whatever form of action he brought his suit—case or *indebitatus assumpsit* or the earlier writs of debt or account. Not until the nineteenth century was "justice strangled in the net of form."

Before tracing the history of the beneficiary's remedy into the eighteenth century a significant fact should be mentioned. During that period when the beneficiary acquired the remedy of *indebitatus assumpsit* he still frequently utilized the older and original remedy of the writ of account. The two remedies were concurrent. The doctrine of consideration had power over neither.

Instances of the persistence of account by the beneficiary occur in 1615, in *Walker* v. *Robson*,[25] in 1637 in *Hughes* v. *Drinkwater*,[26] and in *Goddard* v. *Hoddis*, about 1673.[27]

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[25] Brownlow's Pleadings, Accompt p. 4 (2nd Part., 1654). Here the following were the words of the declaration:

"Ralph Robson late of &c. to answer Brian Walker of a plea that he should deliver his reasonable Accompt from the time that he was receiver of the monies of the said Brian &c. and whereof &c. he saith that when the aforesaid Rich. the last day of July, the year of the Lord 1612 did appear Receiver of the moneies of the said B., that is to say, at London in the Parish of St. Alphage in the Ward of Cripplegate, and then and there received of the moneies of the said B. by the hands of one Tho. Coplet £19 10*s*. to give an Accompt thereof to the said B. when thereto he should be required to give it. And also when the aforesaid Ral. the day and year abovesaid did appeare Receiver &c as first by the hands of one Milo Walker £24 18*s*. to Accompt thereof to the said Br. when to that hee should bee required to give it; notwithstanding the said Ra., although often required to give his reasonable Accompts aforesaid to the said Br. hath not as yet given but that to him hitherto &c." Then follows the plea that the plaintiff, B. Walker, and one Milo were partners and that the money received was paid to him. Trial by jury and verdict and judgment for the defendant.

[26] Hutton, 133. In *Hamond* v. *Ward*, Styles, 287 (1651), Rolle said: "Here it appears that the Action is brought against the defendant as a receiver, and if one receive money due to me upon an obligation, I shall

In Coke upon Littleton, 172, it is written, the remedy of Account "against the receiver is when one receiveth money to the use of another to render an account * * * the plaintiff must declare by whose hands the defendant received the money, &c."

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have either an Action of Accompt or an Action of Debt against him, so if he receive my rents without my consent." The action here was debt upon an *insimul computaverunt.*

" In 1673, "A Book of Entries Containing perfect and Approved Precedents of Counts Declarations &c As well in Actions Real as Personal, and sundry other Entries; useful for all clerks, attorneys and Practisers in the Courts at Westminster and inferior Courts, Collected in the Times, and out of some of the Manuscripts of those famous and Learned Prothonotaries Richard Brownlow, John Gulston, Robert Moyl and Thomas Cory, Esquires, by R. A. of Furnival's Inn," published the following declaration in account:

"SUFFOLK, *ss.*:

ROBERT HODDIS, late of L. in the County aforesaid, merchant, was summoned to answer John Goddard of a plea that he render to him his reasonable account of the time whereof he was receiver of the monies of the said John, etc. and thereupon, etc. he says that whereas the aforesaid R. in the 12th day of August in the year, etc. 2nd at L., had received the monies of the said John by the hands of Anne Chapman, late wife of T. C. deceased, 16 pounds, to render an account thereof to the said John when he should be requested thereto; nevertheless the aforesaid Robert though often requested, has not yet rendered his reasonable account to the aforesaid John but has refused and still refuses to render it to him. Therefore he says he has been injured and has damage to the amount etc."

In Hil. 21 and 22, Car. II in *Hodsden* v. *Harridge,* 2 Saund. 64, the King's Bench refers to Account as to a thoroughly familiar remedy, saying: "And this case may be compared to the case of an Action of Account, where, if the plaintiff declare against the defendant on a rceipt ***by his own hands*** the defendant shall wage his law, but if the plaintiff declares on a receipt by ***other hands*** the defendant shall be ousted of his law, on account of the presumption of law that the County had notice of it."

Brownlow's Entries, pp. 2, 3, published in 1693, contains the form of a declaration in account for monies received at the hands of a third person.

Bohun, in his "Institutio Legalis," p. 435, 1732, says: "If one delivers goods to a third person for my use I may either have an Action of Debt or Account for them at my election."

And the same very words appear in "Instructor Clericalis," p. 316, by R. G. a Clerk of the Court of Common Pleas, London, 1724."

"The Attorney's Practice in the Court of Common Pleas," London, 1746, publishes in full a declaration in account against bailiffs of the plaintiff for monies received at the hands of third persons.

William Sheppard, a lawyer [28] of the Lord Protector's party, has left two treatises which show plainly the continued existence of the right of action of the beneficiary in Account and Debt in 1675. In 1653 this author published "The Faithful Councillor or the Marrow of the Law in English," wherein [29] he sets forth the law relating to the action of Account as follows: "It is a writ lying where a Bailiff of a Lord, Receiver, Guardian, or other hath received money or other things of me, or of another for me, for which he ought to render an account, and he doth refuse to do it; by this means he may be compelled to account, and I may recover not only mine own, but Dammages also if there be cause. *Cook upon Littl.* 172, *F. N. B.* 118." [30]

And in the same treatise, speaking still of Account, he says: "If one receive money of another to my use or to pay over to me, and he do not pay it to me, I may have this Action against him, and so may he that delivered the money to him. *Dyer* 22, 57; 18 Ed. 4, 23." [31]

The remedy by Writ of Debt is also viewed as in full vigor: "If one receive money of another to my use, or to deliver to me or from me, to deliver to another, or to bestow for me, and he doth not dispose it accordingly; in all these cases I may have this Action for the money, or I may have a Writ of Account. *Dyer* 21, 42; *Ed.* 3, 9; *Broo* Condition 6, 38 H. 6, 9."

In 1675 appeared by the same author "A Grand Abridgment of the Common and Statute Law of England." [32] Under the title, "Debt," Sheppard echoes the *leit motif* of the Year Books: "If I deliver money to another to repay to

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[28] "The author was the most industrious and learned lawyer of his age, but his adherence to Cromwell, sufficed to consign, almost to total oblivion, a considerable portion of his numerous writings."—*Marvin's Legal Bibliography*, 643, Philadelphia (1847).

[29] P. 18.

[30] P. 22.

[31] Ib. p. 23.

[32] "This is the first Abridgment of the Common Law that appeared in English, and though possessing considerable merit, it scarcely struggled into existence."—Marvin, 643.

me at a certain day, or to keep safe for me; Or another deliver money to him by the command of a third person to my use, and it be not payd me, I may have this Action."[33] Under the title, "Account," this abridger also reiterates the now trite law.[34]

The names given by the pleader in the seventeenth century to distinguish the two varieties of the action on the case, have reference to the different principles of substantive law underlying each respectively and these technical terms must be clearly distinguished before an attempt is made to trace the actions brought by the beneficiary during the seventeenth and following centuries. If a seventeenth century pleader sought to enforce an accountability or debt created for the benefit of the plaintiff by an action on the case he took for his guidance the rule in Slade's case, and in his declaration set forth first, that there was a debt and, second, that the defendant thereupon promised to pay it. The familiar Latin words of the declaration, describing how the defendant, being a debtor (*indebitatus*), thereupon subsequently made a promise (*assumpsit*) furnished a short and appropriate nickname for this species of the action of the case—*indebitatus assumpsit,* often for brevity reduced to the colloquial, *indebitatus.* Thus the pleader's slang pointed out that the substantive law of the contract of debt underlaid the contract, which he sought to enforce by the machinery of an action on the case. With equal deference to substantive law the writ of case, when employed to enforce a simple contract other than a debt, retained, in the seventeenth century, the long familiar name of *assumpsit.* Sometimes this latter species of the Action on the Case is called "Action on the Case upon a special promise," and sometimes *"Special Assumpsit."*

Sir Matthew Hale was born in 1609—seven years after Slade's case was decided, and he died the year the Statute of Frauds was passed. His decision in 1669 that debt will not lie by the indorsee against the acceptor of a bill[35] is most

[33] Sheppard's Abridgment Title Debt, 531.
[34] Ib. Title Accompt, 13, citing Clark's case, Godbolt, 210.
[35] Milton's Case, Hardres, 485 (1669).

instructive. Two years later he delivered an opinion "that the bare acceptance of a Bill of Exchange makes no Debtor; but if B receives money of A and A draws a Bill on him to C in this case *Indebitatus* lieth by A or C not on the Bill of Exchange but on the other circumstances of coming to his use for the plaintiff." "The court conceived an *Indebitatus* will not lie on a Bill of Exchange unless money be delivered to pay over, for then the *Indebitatus* is grounded on the lending, not on the Bill of Exchange.[36]

At the close of the seventeenth century three distinct forms of contractual liability were recognized in the English law of simple contracts—Debt, Accountability and Assumpsit. All depended upon consent, but actual privity of the plaintiff was not essential in the case of Accountability and Debt.

There were many legitimate children of the action of Debt and they were all called *Indebitatus Assumpsits.*

There is a legitimate child of every *Indebitatus Assumpsit* and each is known as a common count. Professor Ames has clearly set forth this pedigree in general,[37] and nothing remains to be done but to note the descent of the right of action of the beneficiary.

A common count, therefore, based on an Accountability and Debt arising from the transfer of money to the defendant by the hand of another for the plaintiff's benefit with the duty of paying him a sum certain, is not a bastard.

Nor should a common count based upon an Accountability and Debt arising from the transfer of chattels or realty to the defendant by the hand of another for the plaintiff's benefit bear to-day in English courts a bar sinister.

Both these counts are the legitimate grandchildren of Debt and not nameless foundlings discovered on the steps of Westminster Hall.

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[36] *Brown* v. *London*, 2 Keble, 695, 713, 758, 822; S. C., 1 Vent. 152. In the latter report of the case Ventris says: "But they said, if A delivers money to B to pay to C and gives C a Bill of Exchange upon B, and B accepts the Bill and doth not pay it, C may bring an *indebitatus assumpsit* against B as having received money to his use."

[37] II H. L. R., 57, 58.